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on a draft United Nations declaration
on the rights of indigenous peoples
First session
20 November-1 December 1995

CONSIDERATION OF A DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Information received from Governments

Addendum

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JAPAN

[Original: English]
[17 October 1995]

1. In this draft declaration, concrete provisions are given on issues that are critical for national legal systems on lands, natural resources, education, election, and so on. However, those provisions should be practical and flexible, since the historical and social contexts which surround indigenous people differ, and so do the legislative and judicial systems of each State. In particular, where those systems are founded on the principle of freedom and equality, the relation between the principle and the provisions in this declaration should be clearly identified and compatible.

2. The declaration drafted by the United Nations or its specialized agencies should not be understood as legally binding. Thus, it is inappropriate to call upon States, or to bear legal obligations on States to take effective measures, as this draft declaration says.

3. International instruments prescribing rights should be drafted in such a way that the subjects, objects, extent to be covered, requisites and effects are clearly recognized and should use accurately selected language. Nevertheless, this draft declaration contains too much unclear wording and ambiguous language as a platform for an international instrument. In addition, when words are quoted from the existing body of international instruments, care should be taken not to twist their meaning.

4. "Collective rights" stipulated in this declaration (in arts. 6, 7, 8, 34, etc.) cannot be found in international instruments drafted and adopted by the United Nations in the past. This concept is not yet firmly established. Therefore, we should be careful when introducing these rights. Moreover, the rights that can be adopted in the catalogue of human rights in declarations of United Nations human rights forums are fundamental human rights for individuals. Introducing "A new category of rights" would be overstepping the mandates of the Commission on Human Rights by broadening the scope of the rights proclaimed.

5. As recognized in General Assembly resolution 41/120, which calls for new international instruments in the field of human rights to be consistent with the existing international human rights laws, the consistency between the rights and duties listed in this draft declaration and the existing human rights conventions should be thoroughly examined.

6. It cannot be meaningful to draft this declaration without clearly defining the term "indigenous populations" who are to be entitled to the rights listed in this instrument. Furthermore, using the term "indigenous populations" without establishing objective definitions would cause arbitrary interpretation and end up with confusion.

MEXICO

[Original: Spanish]
[12 September 1995]

1. The Government of Mexico appreciates that one of the wishes shared by numerous Governments and indigenous peoples is that during the International Decade of the World's Indigenous People, a declaration on the rights of indigenous peoples should be proclaimed on the basis of the draft submitted by the Working Group on Indigenous Populations, contained in the annex to resolution 1994/45 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

2. Accordingly, the Government of Mexico believes that analysis of the draft declaration provides an excellent opportunity to debate a number of important issues, such as the definition of "indigenous peoples". In this connection, the Government of Mexico fully concurs with the opinion of the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, that "an important first question to be addressed by the Working Group is the desirability of developing a definition of indigenous peoples" (see, document E/CN.4/Sub.2/AC.4/1995/3, para. 4). The Government of Mexico also shares the view that a clear distinction has to be made between the concepts of "indigenous peoples" and "minorities".

3. Regarding the definition of "indigenous peoples", the Government of Mexico believes that the definition contained in article 1 of ILO Convention No. 169 of 1989, concerning indigenous and tribal peoples in independent countries, to which Mexico is a party, constitutes the foundation for any future international instrument relating to the rights of indigenous peoples.

4. With regard to the concept of the right of self-determination, provided for by article 3 of the draft declaration, the Government of Mexico is concerned that it might be understood, for the purposes of international law, in the same way as in the first articles of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Accordingly, the Government of Mexico supports the proposal submitted by Chile at the Technical Meeting on the International Year and the International Decade of the World's Indigenous People, that a second interpretative paragraph should be included in article 3 to clarify the scope of that article, or that the wording proposed should be amended as follows:

> "Indigenous peoples have the right to be recognized and to define themselves as such, with their differences, and to pursue their development in accordance with objectives, aims and methods in keeping with that definition, as part of the plural society that makes up the State to which they belong."

5. The draft prepared by independent experts within the Working Group on Indigenous Populations is a good basis on which to prepare a declaration. However, the draft should take into consideration the opinions of Governments, and, of course, the constitutional and legal precepts that have been adopted nationally. Where Mexico is concerned, it is necessary to take into account article 27 of the Constitution, which organizes the legal regime of property

ownership and has considerable social significance, since private property does not constitute an absolute right as it is restricted by the public interest.

6. Under article 27 of the Constitution, ownership of land and water may be characterized as public, private or social. The Nation transmits title thereof to private persons in order to constitute private property, and to ejidos and communities, most of whom belong to indigenous people, in order to establish social property reserving for itself ownership and direct title of specific properties, which form part of public property. Land expropriations may be made only in the public interest and against compensation.

7. As a contribution to preparing and finalizing the draft declaration, the Government of Mexico offers the following specific observations concerning the compatibility of the proposed text with the provisions of Mexico's Constitution.

(i) Concerning article 7, paragraph (b) of the draft declaration, which establishes the right of indigenous peoples to prevention and protection against "any action which has the aim or effect of dispossessing them of their lands, territories or resources", a more precise definition is necessary of what is meant by "any action", as the current wording could be set in opposition to the provisions concerning expropriation in the public interest provided for by the Constitution.

In this respect, article 27 paragraph 2, section VI, of the Constitution stipulates that "the laws of the Federation and of the States ... shall determine in which cases the occupation of private property by the State is in the public interest". Whatever the case, the second paragraph of article 27, section VII, of the Constitution, which states that "the law shall protect the integrity of the land of indigenous groups" is applicable.

(ii) Regarding article 21 of the draft declaration, the Government of Mexico is concerned about the vagueness of the section relating to the right of indigenous peoples "to maintain and develop their political, economic and social systems ...".

Regarding the last part of article 21, relating to the right of indigenous peoples "who have been deprived of their means of subsistence and development" to "just and fair compensation", it would also be necessary to take into consideration the provisions relating to the protection of the integrity of the lands of indigenous groups, the protection of land for human settlement and the regulation of land use, laid down in paragraphs 2, 3 and 4 of article 27, section VII referred to above, and in the often quoted second paragraph of section VI.

(iii) Regarding article 26 of the draft declaration, which provides for the right of indigenous peoples "to own, develop, control and use their lands and territories ... (including) the right to the full

recognition of their laws (of the indigenous peoples), traditions and customs, land-tenure systems and institutions for the development and management of resources", this could conflict with the provisions of article 27 of the Constitution.

Under the first paragraph of article 27, "ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transfer title thereof to private persons, thereby constituting private property". Under the third paragraph of article 27, the Nation "shall at all times have the right to impose on private property such limitations as the public interest may demand, ... in order to ensure a more equitable distribution of public wealth".

In the cases referred to by the above two provisions, Mexico's Constitution stipulates that "ownership by the Nation is inalienable and imprescriptible, and the exploitation, use, or appropriation of the resources concerned may not be undertaken except through concessions granted by the Federal Executive, in accordance with rules and regulations established by law" (section VII, fifth paragraph).

(iv) Regarding article 27 of the draft declaration, which stipulates that indigenous peoples "have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used", the seventh paragraph of article 27, section VII, states that the process of restitution of lands, forests and waters to centres of population shall be carried out under the terms of the regulating law.

(v) Article 30 of the draft declaration establishes the right of indigenous peoples to require that States "obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources". This provision might be at variance with a number of the precepts of the Constitution already referred to, such as that which stipulates that expropriations shall be "only in the public interest and against compensation", and with the provisions of section XVII, which states that "the Congress of the Union and the State legislatures, within their respective jurisdictions, shall adopt laws to establish procedure for breaking up and expropriating estates.

MOROCCO

[Original: French]
[16 October 1995]

1. Article 3 of the draft declaration states that "indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

2. Article 31 states: "Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions".

3. These provisions and many others, in their current form, appear to be incompatible with existing practice under international law. Use of the term "indigenous peoples" in the draft declaration to describe subjects at law might well lead to an ambiguous interpretation incompatible with international law. It will be remembered that the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960) links the question of self-determination to the principle of territorial integrity. However, the draft declaration makes no allusion either to the principle of territorial integrity or to that of sovereignty.

4. The content and scope of certain notions should be further clarified. This is the case, inter alia, of the right of indigenous peoples to self-government in matters relating to their "internal and local affairs", and to the "demarcation of indigenous lands" and access by indigenous peoples to procedures for the resolution of disputes with States (arts. 31, 32, 35, 37 and 39 of the draft declaration).

UNITED STATES OF AMERICA

[Original: English]
[30 October 1995]

1. The United States Government is pleased to indicate its appreciation and support for the Working Group on Indigenous Populations in preparing the draft entitled "United Nations Declaration on the Rights of Indigenous Peoples". It is hoped that the ultimate adoption of a declaration will succeed in focusing attention on the need to fight discrimination based on indigenous origin wherever it occurs, protect indigenous rights, and foster appreciation for and understanding of the value of indigenous traditions, cultures and institutions.

2. The United States Government remains deeply committed to promoting and protecting indigenous rights throughout the United States, as well as throughout the world. Under the United States Constitution, indigenous individuals and groups are guaranteed protection of their vested property rights and of their basic individual rights, including their right to freely associate, engage in religious practices and maintain distinct social and cultural identities. It is the goal of the United States to build a relationship with its own indigenous communities based on recognition of their cultural identity, and acting in partnership and consultation with them. In

particular United States policy continues to support the tribal governments of federally recognized American Indian tribes and Alaska native villages. Relations between the United States and these tribes have been conducted on a government-to-government basis.

3. At the fifty-first session of the Commission on Human Rights, the United States Government strongly supported the adoption of resolution 1995/32 which established an open-ended inter-sessional working group to consider as a matter of priority the "United Nations Draft Declaration on the Rights of Indigenous Peoples". It is hoped that the working group will succeed in negotiating a strong and useful declaration which reaffirms indigenous rights and is consistent with international law. The United States stands ready to work in partnership with tribal governments and States Members of the United Nations to make the declaration a reality.

4. Indigenous contributions to the process will be vital to the successful outcome. The United States fought hard during the fifty-first session of the Commission to ensure that indigenous organizations not in consultative status with the Economic and Social Council, including tribal governments, would also have an opportunity to contribute to the negotiation. It is much appreciated that consensus was achieved on a procedure that will allow "relevant organizations of indigenous people" to apply to participate in the process.

5. Below follow several preliminary comments on the draft declaration. It should be emphasized that these are not meant to be exhaustive or final. The United States reserves the right to make additional comments during the course of negotiations to ensure consistency with international law.

Rights versus goals

6. While the United States Government finds itself in agreement with the basic goals of the draft declaration, it should be emphasized that a number of provisions in the current draft refer to "rights" which do not currently exist under international law. It should not be necessary to convert aspirations or objectives into "rights" in order to call attention to them. Rather, the term "rights" should be reserved for those duties that Governments owe their people, the breach of which generally gives rise to a legally enforceable remedy.

7. In a number of situations, the declaration could be made more consistent with international law if the provision in question were to call upon States to take certain measures in appropriate circumstances, rather than purport to create new rights. For example, article 17, suggesting certain rights of control over access to and content of media, would be consistent with international law if reformulated as a provision calling upon States to take steps to promote diversity of ownership and programming.

Applicable law

8. While certain indigenous communities, such as recognized tribal governments, may be largely self-governing and exercise autonomy over a broad range of issues, as they do in the United States, these powers of self-government are exercised within the overall domestic legal framework of

the State in which they reside. Accordingly, we will need to find appropriate language to narrow provisions suggesting that indigenous communities, like recognized tribal governments, are not also subject to the legal structure of their State. See, for example, article 20 which seems to imply that "indigenous peoples" have the unqualified right to veto legislative or administrative measures affecting them.

Definition

9. The United States Government notes that although the draft declaration refers consistently to the term "indigenous peoples", it does not define it. In principle, it would seem important to have a universally-accepted definition of "indigenous" to ensure that the instrument is "sufficiently precise to give rise to identifiable and practicable rights and obligations", in the language of General Assembly resolution 41/120. However, efforts to define "indigenous" in a way satisfactory to all have so far been unsuccessful. The United States hopes that failure to date to resolve the definitional issue will not delay the Working Group's general discussion of the draft declaration.

Collective/individual rights

10. In addition, there is need to review carefully the use of the term "peoples" in the declaration when affirming individual human rights. Since international law, with few exceptions, protects and promotes the rights of individuals, as opposed to groups, it is for the most part inaccurate and confusing to state that international law accords certain rights to indigenous "peoples" as such. Thus, in certain cases, it is entirely appropriate and indeed necessary to refer to indigenous "people", or members of indigenous communities or groups, in order to reinforce their civil and political rights on the basis of full equality and non-discrimination.

11. Use of the plural "peoples" in the context of international law generally implies a right of self-determination and permanent sovereignty over natural resources, among other collective rights. Such rights may or may not be accorded by States under their domestic laws to indigenous communities. At the same time, we understand the concerns of some indigenous groups that self-identify as a "people" and for that reason prefer to use the plural when referring to more than one indigenous group. It should be clear, however, that use of the term "peoples" in this sense shall not be construed as having any implications as regards the rights which may attach to the term under international law.

12. As a matter of domestic law and policy, not international law, the United States takes special measures to protect certain groups beyond ensuring that they enjoy equal rights on a non-discriminatory basis. However, endorsement of rights or special measures that States have taken with respect to their indigenous communities under domestic law must not overlook or undermine the internationally-recognized human rights and fundamental freedoms of the community's members or of members of a larger society. For example, certain articles that are designed to protect indigenous cultural rights (see arts. 15, 17, 29 and 30) should be redrafted to ensure that these measures do not impinge upon the human rights of individuals.

Self-determination

13. The United States strongly supports the principle of self-determination as set out in the Charter of the United Nations. From the first days of our republic, the United States has recognized Indian tribes as political entities, with powers of self-government. Since the 1960s, there has been a concerted effort to reaffirm and strengthen this long-standing principle of domestic law. In the domestic United States context "self-determination" means promoting tribal self-government and autonomy over a broad range of issues. Under contemporary international law, however, the term "self-determination" is open to varying interpretations, depending on the specific context. Taken to its extreme, the term has been interpreted in the context of colonialism to mean the right to an independent State. While current views among scholars and Governments may be changing on the meaning of "self-determination", there may not yet be an international consensus. Accordingly the explicit and implicit references to self-determination will have to be reviewed carefully. The declaration might, for example, consider increased self-government and autonomy for indigenous communities in appropriate circumstances, without necessarily providing an independence option in all situations and circumstances.

Conclusion

14. The United States Government is committed to working with other Governments to ensure a strong and useful declaration that recognizes the rights of indigenous people and the communities to which they belong and that promotes dialogue and cooperation between Governments and indigenous communities. As President Clinton stated in a recent letter to indigenous communities in the United States, "working together, we can usher in a new era of understanding, cooperation and respect, leading the way to a brighter future for all of our people".